BANQUE NATIONALE DE PARIS

v.

LEE CHIONG WOO

HIGH COURT SABAH & SARAWAK, KUCHING
ZAKARIA SAM JC
[ORIGINATING SUMMONS NO: 24-354-99-III(II)]
21 NOVEMBER 2000

CIVIL PROCEDURE: *Reciprocal enforcement of judgments - Setting aside registration of foreign judgment - Grounds - Whether judgment obtained pursuant to an unenforceable guarantee between parties - Whether permission of Controller of Foreign Exchange required before guarantee could be executed - Exchange Control Act 1953, ss. 9, 36(1)*

This was an application by the defendant to set aside the registration of a judgment in default obtained against him in Singapore as a judgment of the High Court in Sabah and Sarawak. The plaintiff obtained the judgment in default pursuant to a letter of guarantee that was executed between the parties in Singapore for a loan taken with the plaintiff by a third party. The third party had a registered office in the British Virgin Islands. The defendant contended that ss. 9(1) and 36(1) of the Exchange Control Act 1953 ('the Act') and para. 4.3 of the ECM Notice that was issued pursuant to the Act clearly stated that the permission of the Controller of Foreign Exchange was required for any payment to be made to a non-resident in Ringgit Malaysia. Also, such permission was required before the execution of the guarantee. As no such permission was obtained, the guarantee herein was illegal and unenforceable and therefore against the public policy of Malaysia to register a judgment based on an illegal and unforceable guarantee.

Held:

[1] In *American Express Sdn Bhd v. Dato Wong Kee Tat & Ors*, it was held that if at the time of the contract the law requires that the permission of the controller must first be obtained before its performance, then the performance is postponed until the permission is obtained. The performance in this context is the payment from Malaysia to persons outside Malaysia. The postponement of performance, however, does not prevent the creditor from suing and obtaining judgment. That is the interpretation of ss. 4 and 9 read with s. 36 of the Act and further illustrated by O. 22 rr. 1 and 9 of the Rules of the High Court 1980.

[2] The signing of guarantees in Malaysia is not an act which is preparatory to lending foreign currency to persons outside Malaysia within the meaning of s. 4(2) of the Act. The prior permission of the controller is also not required under s. 9(1) before a foreign plaintiff can sue the defendant in Malaysia as such an act is not preparatory to making payments outside Malaysia. Section 9(1) will only apply after judgment has been obtained and that too only if the foreign plaintiff insists on payment outside Malaysia.

[Application dismissed.]

Case(s) referred to:
American Express Sdn. Bhd. v. Dato' Wong Kee Tat & Ors [1990] 1 CLJ 17 ***(foll)***

Legislation referred to:
Exchange Control Act 1953, ss. 9(1), 36(1)

For the plaintiff - Gabriel Wong; M/s Ting Goh & Assocs
For the defendant - Rosleenda Sayumi; M/s Idris & Co

Reported by Usha Thiagarajah

JUDGMENT

Zakaria Sam JC:

The defendant in this case is a guarantor by virtue of a letter of guarantee dated 12 October 1996 executed in the Republic of Singapore. The borrower is Pomerton Limited whose registered office is in British Virgin Islands. Facility granted to the borrower is for USD10 million.

On 12 August 1999 judgment in default was entered against the defendant in the High Court in the Republic of Singapore (after this referred to as Singapore judgment) for a sum of RM40,179,838.77.

The plaintiff had on 14 December 1999 registered the Singapore judgment as judgment of the High Court in Sabah and Sarawak.

A notice dated 2 February 2000 was served on the defendant on 24 February 2000 giving him a period of 14 days from the date of service to set aside the registration.

Pursuant thereto the defendant filed this application (dated 3 March 2000) to set aside the registration of the Singapore judgment.

The grounds of the said application are as follows:

(a) That the enforcement of judgment is contrary to public policy in Malaysia insofar as neither the defendant nor the plaintiffs had obtained prior

written permission of the controller of foreign exchange who is the Governor of Bank Negara, contrary to the provisions of the Exchange Control Act, 1953 for the execution of the guarantee dated 12 October 1996.

(b) That the guarantee dated 12 October 1996 is illegal and unenforceable as it contravened contrary to the provision of the Exchange Control Act, 1953,

(c) That it would be against public policy of Malaysia to register a judgment based on an illegal and unenforceable guarantee in contravention with the Exchange Control Act 1953.

In filing this application the defendant is relying very much on ss. 9(1) and 36(1) of the Exchange Control Act 1953 which reads:

S. 9(1) Except with the permission of the Controller, no person shall in Malaysia do any act which involves, is in association with, or is preparatory to, the making of any payment outside Malaysia, to or for credit of person resident outside the scheduled territory.

S. 36(1) It shall be implied Condition in any Contract that, where by virtue of this Act, the permission or consent of the Controller is at the time of the contract required for the performance of any term thereof, that term shall not be performed except insofar as the permission or consent is given.

In addition thereto, the defendant also referred this court to the ECM notice issued pursuant to the Exchange Control Act in particular paras. 4 and 4.3 which reads:

Para 4. The prior permission of the Controller is required for:

4.3 A resident to make payment in Ringgit to a non-resident in relation or consequential to any guarantee.

It is the defendant's contention that these three provisions clearly state that for any payment to be made to non-resident in Ringgit Malaysia, the permission of controller of foreign exchange, *ie*, the Governor of Bank Negara is required. Even before the execution of the guarantee such permission must be obtained first. Therefore the contract between the plaintiff and defendant is illegal due to the non-compliance of the mandatory provision of the Exchange Control Act 1953 and ECM notice issued thereunder. It is further contended that it is against public policy of Malaysia to register a judgment based on illegal and unenforceable guarantee.

What is the true construction of these provisions? The answer could be found in *American Express Sdn. Bhd. v. Dato' Wong Kee Tat & Ors* [1990] 1 CLJ 17 where the Supreme Court held that:

> What we think has clearly misled the respondents in the instant case are the words 'at the time of the contract' appearing in s. 36(1) to mean that prior permission of the Controller is required at the time the guarantees are signed and as no such permission had been obtained, the guarantees are illegal and therefore unenforceable. In our view, what that subsection means is that if at the time of the contract the law requires that the permission of the Controller must first be obtained before its performance, then the performance is postponed until the permission is obtained. The performance in this context is the payment from Malaysia to persons outside Malaysia. The postponement of performance, however, does not prevent the creditor from suing and obtaining judgment. That this is the correct interpretation of ss. 4 and 9 read with s. 36 is further illustrated by RHC O. 22 rr. 1 and 9 providing for the payment into court and payment out under Exchange Control Act 1953. The statutory form of the writ also draws attention to the Exchange Control Act 1953 and is clearly shown on the writ in the present case.

Having said that the Supreme Court proceeded to decide on the facts of the case whereby it was held that:

> On the facts of this case, it is clear that the entire transaction was between two companies resident in Singapore and the moneys lent and borrowed were in US currency. It is equally clear that the respondents were neither the lenders nor the borrowers. They were the guarantors or third parties to the transaction. The signing of the guarantees in Malaysia, in our view, is not an act which is preparatory to lending foreign currency to persons outside Malaysia within the meaning of s. 4(2,). Nor is the prior permission of the Controller required before signing the guarantees under s. 4(2).
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> The prior permission of the Controller is also not required under s. 9(1) before a foreign plaintiff can sue the defendants in Malaysia as such an act is not preparatory to making payments outside Malaysia. Section 9(1) will only apply after judgment has been obtained and that too only if the foreign plaintiff insists on payment outside Malaysia.
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> Be that as it may, we find that the guarantees executed by the respondents in the present case are perfectly good and valid guarantees and are in no way in contravention of the Exchange Control Act 1953 as there has been no contravention of s. 4(2); there is no evidence that if and when the guarantees are to be honoured the parties intended performance without the permission of the Controller and accordingly s. 36 applies. As the guarantees are not in breach of the Exchange Control Act 1953, the issue of illegality of contract under the Contracts Act 1950 does not arise.

As the facts of the present application are similar to the *American Express Sdn. Bhd*'s case the above decision comprehensively answered all the issues raised by the defendant.

I therefore dismissed the application dated 3 March 2000 with costs to the plaintiff to be taxed unless agreed.